

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VS.

AND

AND

Docket No. 162,695

ORDER

ON the 29th day of March, 1994, the application of the respondent and insurance carrier for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge Robert H. Foerschler, dated March 4, 1994, came on for oral argument.

APPEARANCES

Claimant appeared by his attorney, Robert W. Harris of Kansas City, Kansas. The respondent and insurance carrier appeared by their attorney, Patrick E. White of Kansas City, Missouri. The Kansas Workers Compensation Fund appeared by its attorney, Charles D. Vincent of Paola, Kansas.

RECORD

The record considered by the Appeals Board is the same as that specifically set forth in the award of the administrative law judge.

STIPULATIONS

The stipulations of the parties are the same as those specifically set forth in the award of the administrative law judge.

ISSUES

The administrative law judge found that claimant suffered an accidental injury that arose out of and during the course of his employment with the respondent and was, therefore, entitled to benefits under the workers compensation act. The respondent and insurance carrier have requested the Appeals Board to review that finding. The issues that are now before the Appeals Board are:

(1) Whether claimant sustained accidental injury arising out of and in the course of his employment with the respondent.

(2) Whether respondent had notice of the accidental injury; if not, whether respondent was prejudiced thereby.

(3) Whether claimant made timely written claim for benefits.

(4) Whether claimant is entitled to the medical expense incurred for treatment of the alleged knee injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds as follows:

(1) Claimant has established by a preponderance of the credible evidence that he has sustained personal injury by accident arising out of and in the course of his employment with the respondent as a result of repetitive mini-trauma to his right knee. For purposes of this award, claimant's last day of work, May 11, 1991, will be used as the date of accident.

Claimant has a long history of right knee problems as he initially injured it in a motorcycle accident in 1972. Claimant had a partial knee replacement in 1976 and then a total knee replacement in 1979. Both of these operations were performed by orthopedic surgeon, Harry B. Overesch, M.D. In 1987, claimant reports that he experienced increased symptomatology in the right knee which progressively worsened until he received a second knee replacement on June 7, 1991, by Dr. Gurba. Although claimant began working for the respondent in 1978, no workers compensation claim was made for the knee problems resulting in the 1979 total knee replacement. In this proceeding, we are concerned with the symptoms that began to increase in 1987 which resulted in the second knee replacement by Dr. Gurba in June 1991. By the time claimant consulted Dr. Gurba, the pain in his knee was excruciating.

Claimant testified that his job with the respondent as a delivery man required him to constantly step up and down from his truck to load and unload bread racks and to spend a significant portion of his day walking. Claimant testified that he made approximately 22 stops per day during his 12-14 hour daily schedule. Claimant estimated that he drove approximately 2 1/2 to 3 hours per day, spending the remainder of the day loading and unloading the truck, pushing bread racks in and out of the stores, filling the bread racks, and doing book work which required approximately 1 1/2 hours per day. A review of the

testimony of retired orthopedic surgeon, Harry B. Overesch, M.D., indicates that all stresses, including employment, contribute to a gradual deteriorating process in a replacement knee; however, Dr. Overesch believes that claimant's job duties definitely would have accelerated the deterioration process and need for the second knee replacement.

After his second total knee replacement, claimant was released to return to work in January 1992. Claimant states that he is unable to do his former job as a route delivery man as he experiences pain and swelling in his right knee and is unable to walk a significant distance. Also, claimant testified that he lacks range of motion in his knee, cannot bend down very far due to it swelling, and that it wants to buckle. Claimant states his right knee is much worse now than it was following the first knee replacement in 1979. Dr. Overesch believes that claimant's impairment of function has increased from 25-30% following the surgery in 1979 to 50% following the 1991 surgery due to increased scar tissue and less bone stock.

Based upon the above, the evidence establishes that claimant has experienced personal injury by accident arising out and in the course of his employment with the respondent. As defined by K.S.A. 44-508(e) the definition of "injury" includes any lesion or change in the physical structure of the body, causing damage or harm thereto.

(2 & 3) The evidence is uncontroverted that claimant gave respondent timely notice of his accidental injury. At regular hearing, claimant testified that during his last year of work, that he complained to his supervisors of a ramp in Olathe that was giving him problems and causing his right knee to pop and give way. Immediately before his operation in June 1991, claimant told his supervisor that he had major knee problems and that a certain ramp had hastened and magnified his problems. Claimant also testified that his immediate supervisor was aware of the problems he was having with his knee and that he knew claimant was seeing a physician for those problems.

Despite the respondent's knowledge that claimant's right knee was worsening and that claimant needed surgery, the respondent did not report the incident to the Director of Workers Compensation as required by statute. See K.S.A. 1990 Supp. 44-557. Therefore, the time required for written claim for compensation is extended to one year. K.S.A. 1990 Supp. 44-557(c). The parties agree that claimant made written claim for workers compensation benefits within that one year period.

Based upon the above, the Appeals Board finds that the respondent had actual notice of claimant's injuries and that claimant has filed a timely written claim for his workers compensation benefits.

(4) The respondent and insurance company are responsible for all of the medical treatment incurred by claimant for his right knee replacement in June 1991.

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, as may be reasonably necessary to cure and relieve the employee from the effects of the injury. K.S.A. 1990 Supp. 44-510.

If the employer has knowledge of the injury and refuses or neglects to reasonably provide the benefits required by this section, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director. K.S.A. 1990 Supp. 44-510(b).

As the respondent neglected to provide authorized medical treatment, claimant was free to select his own physicians, and the medical expense that he incurred is deemed authorized and payable by the respondent and insurance carrier.

(5) Claimant is entitled to future medical expense upon proper application to the director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated March 4, 1994, is modified in the respect that the respondent and insurance carrier are responsible for the medical expense incurred by claimant for his knee replacement in June 1991. The remaining orders of the administrative law judge as set forth in his award of March 4, 1994, are adopted by the Appeals Board and incorporated herein by reference as if fully set forth.

IT IS SO ORDERED.

Dated this ____ day of July, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Robert W. Harris, PO Box 1215, Kansas City, Kansas 66117
Patrick White, PO Box 7156, Kansas City, Missouri 64113
Charles D. Vincent, 7 Lewis Drive, Paola, Kansas 66071
Robert H. Foerschler, Administrative Law Judge
George Gomez, Director